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In the

United States Circuit Court of Appeals

For the Ninth Circuit

THE JAPANESE STEAMSHIP "BOSTON MARU"

Appeal From the United States District Court, for the District of Oregon

Appellant's Brief

HON. ROBERT S. BEAN, *Judge*

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ARMBRUSTER & RENFRO, INC.

TOPICAL INDEX

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No questions of pleading and practice are to be discussed in this brief nor will any, we think, be raised by respondent. The pleadings raise the issues presented in the District Court and the Assignments of Error bring the same issues to this court. *Italics herein are ours unless otherwise stated.*

The Boston Maru and West Keats were in collision October 26, 1924, at 1:44 A. M. The Shipping Board brought suit against the Boston to recover the damage suffered by the West Keats. Stipulation and claim were filed by Kokusai Kisen Kabushiki Kaisha. This Japanese corporation then brought suit against the Government to recover the damages suffered by the Boston.

Answers were filed and the issues made. The two cases were consolidated and tried together. Damages of both parties were stipulated. The Honorable Robert S. Bean signed a decree in favor of the contentions of the Boston. Separate appeals were perfected in each of the cases and the District Court thereupon consolidated the cases further for apostles, briefing, argument and further consideration by the Circuit Court of Appeals.

We turn to the merits and will contend:

1. That the Boston Maru was anchored at the time of the collision in the worst possible place in which she could have been anchored in that part of the Columbia River; that her midships was approximately 700 feet westerly and 400 feet southerly from the customary anchorage; she was approximately at right angles across the main ship channel; she was allowed to drift with the tide across the channel and no attempt was made by use of her engines or stern anchor to keep her up and down the river; she was lying directly across the channel at the intersection of two Government established ranges designating the channel.

2. That there is no direct evidence in the record tending to prove any specific act of negligence on the part of the West Keats; the preponderance of evidence upholds her conduct; her

negligence, if any, rests on presumption and argument.

West Keats' Exhibit No. 1

This exhibit is before the court along with the other original exhibits. It is a large U. S. Engineers' blueprint with red and yellow lines and wording inked thereon and also marks made by or in behalf of various witnesses and described in the record. R. E. Hickson, War Department Engineer (A 62), who has been surveying the Columbia River since 1909 for the Government, placed the inked lines on the chart under employment as an expert by the Shipping Board. The chart and additional marks thereon are all authenticated and described in the record.

A chart is at best a poor description of a river. No court can fully understand the facts of a case of this kind due to inability to study the river with the eyes and instincts of a skilled navigator under conditions exactly reproducing the conditions of light and darkness at the time and place of the collision. The blue print is the best substitute for actual observation which the record affords.

The Tide

The tide which caused the swinging of the Boston was low at St. Helens at 11 to 11:15 P. M. October 25th (A 91). The water remains at the low period for a considerable length of time in

that part of the river, about one and a half hours. The tide was high at the point of the collision at 3:14 A. M. October 26th (A 90), and the rise was 3.7 feet. The current turns backward upstream at the latter part of the flood tide (A 345). The above data were furnished by Mr. Hickson. They are based on current observations and the attractive force on the particular tide in question but does not include variations which might be due to weather conditions. Chiga, who was on watch on the Boston Maru, stated that the current started to flow up stream at 1:10 A. M. October 26th.

Angle of Boston Maru to Shore

We believe that the vessel was about as shown on the chart at the "position at collision," namely, at about right angles to the channel and Oregon shore. Of course the exact direction lines of the channel and the shore are open to question and the court will understand that the determination of these on the river is less easy than on the chart.

Respondent took the depositions of the Japanese officers and crew a couple of weeks after the collision. Second Mate Chiga was on watch at the time of the collision. About three minutes before the collision he saw the West Keats coming down the river. He was then standing on the starboard side of the Boston's lower bridge (A 535-537). He said the Boston was pointing partly

downstream and that he could see the West Keats looking to the starboard and aft. He also said that the current started to run upstream at about 1:10 A. M. (A 565-566). Chiga said (A 566):

Q. Before the "Boston Maru" started to move she was up and down the river, wasn't she, with her head upstream?

A. Yes.

Q. And after she started to move she swung so that she was across the river, didn't she?

A. Yes, sir.

Mr. Snow: That is all.

Redirect Examination by Mr. King

Q. And didn't she continue to swing some more so that her stern got to be upstream—first, she started with her stern downstream and then she continued to swing and went clear around until her stern was upstream; isn't that true?

Mr. Snow: You are leading your witness there, Mr. King.

A. Yes; the stern went up.

Q. (By Mr. King) Well, I will withdraw that. And was that the position of the stern at the time that the collision took place, a little bit upstream or somewhat in that position?

A. Yes.

Chiga did not have a pilot's familiarity with the river but having taken bearings the night before knew pretty well which way was upstream. Having taken this observation he went inside and his description of events connected with the collision stopped there. He did nothing about the swinging of the Boston, either by way of waking the pilot, getting the stern anchor out to stop the swinging, or giving a stand-by to the engine room with a view of using the engines.

Evidently the Boston drifted shortly before the collision to a point more than at right angles from her position when the bearings were taken. Perhaps the vagaries of the current swung her back a little because Berry and Gillette testified that she was approximately at right angles when they struck her. Of course they could only see her lights and the dimmest outline of her hull, the latter only when they were on top of her. Their judgment is to be taken as approximate only but they are consistent with each other. Captain Swenson of the Keats who came on deck at the sounding of the telegraph a minute before the collision arriving immediately thereafter, agreed with them. (A 383.)

The next man who attempts to state the angle of the Boston was Captain Gildez, who was awakened by the shock and came on the deck of the Boston soon after the collision. With only the range lights and other shore lights and the mov-

ing lights of the Keats to guide him, Gildez says that the Boston was then lying with her stern at an angle of about 45 degrees down stream (A 313). Perhaps the force of the collision knocked her to approximately this position. Captain Swenson says her stern swung down at the impact (A 510).

At the trial respondent attempted to break down the testimony of their own witness Chiga and that of Berry, Gillette and Swenson by asking pilots to examine the photographs of the twisted, bent and broken plates and beams of both vessels and to state as experts from this examination at what angle the vessels came together. Those willing to testify answered for the most part that the angle was about 45 degrees and on cross examination said that they did not know. Page after page of the record is filled with this theoretical testimony. We do not now review it here as we do not regard it as throwing any real light on the issue. We suspect that a marine surveyor, a real expert on such an issue, would have declined to testify thereon.

We think that Mr. Hickson, in locating the Boston on the chart at approximately right angles to the general line of the shore and channel, has followed a clear preponderance of the testimony.

Distance of Boston Maru From Shore

The vessel is 400 feet long, 53.2 feet beam, draft — feet forward, 26 feet one inch aft and 8,017 dead weight tons. From the compass on the bridge to the hawse hole is 136 feet (A 517). The evening before the collision under Columbia River Pilot Gildez she arrived off Columbia City and dropped anchor heading toward the Oregon shore. The current and tide were running down and she then swung down stream on thirty fathoms from the windlass (A 317). Second Mate Chiga thereupon took the bearings shown on the chart with an ordinary dry ship's compass. The instrument had been tested in Japanese waters a month or two before the collision but at best could be only relatively accurate. The longest leg of the triangle of error is two hundred feet. The two positions of the Boston are platted on the chart from these bearings, but two modifications should be noted.

The first modification is explained by the smaller blueprint attached to the large one. Chiga also took the bearings of the stem of his vessel from the compass which was amidships. When Mr. Hickson came to place the outline of the vessel on the chart he found that the bearing of the bow did not line the vessel up with the current as the same is shown by the arrows on the main chart and the attached blueprint. Hickson's testimony was that these arrows are correctly

placed through observation of currents made from time to time by the Government engineers. There was not much wind when the Boston was anchored, and the wind unless very strong would not change her position much as against the force of the current. We are forced to take one of two conclusions: (1) either Chiga or the compass was in error in taking the bearing of the ship's bow or (2) through some peculiarity the current was not setting in its normal direction. As he plotted the initial position on the main chart Mr. Hickson assumed that the bearing was erroneous and omitted it. In the small chart he assumed that the bearing was correct and that the current was peculiar and so placed the vessel. This difference is important. If the bearing is correct the Boston's anchor was fifty feet nearer the Oregon shore than if the bearing was incorrect.

The second modification is that in turning the Boston around to her assumed position at the time of the collision Mr. Hickson probably left too great a distance between the anchor and the bow. The preponderance of testimony was that in the absence of a strong wind a ship turning on her anchor with the tide would tend to ride her anchor more or less. Hickson represented a considerable sag in the chain but probably not enough to suit a fair interpretation of the record.

There is no testimony as to the actual set of the current when the Boston was anchored. But

Chiga who took the bearings and the man who helped him testified that they were correctly and accurately taken. Therefore the more cogent testimony supports substantially the initial position as shown on the small blueprint. Allowing for more riding of the anchor than did Mr. Hickson, we place the Boston's stern at something like the same location in which it is shown on the big chart. Therefore, we think that the position at collision of the Boston as depicted on the big chart is substantially in accordance with the record.

There is testimony tending to show that the Boston was anchored closer in than her bearings would indicate. Captain Berry, pilot of the West Keats, said that the Keats was about 150 feet away from the Oregon shore at the time of the collision. But the night was extremely dark and he could barely discern the black line of the Oregon bank. Also Captain Gildez estimated that he had anchored her six or seven hundred feet out from the Oregon shore. The closeness of the Boston's stern to the Oregon shore is definitely shown by the testimony relating to the failure of the Keats to answer her starboard helm on account of suction. This clear and undisputed testimony of both Berry and second officer Gillette, supported by much expert testimony, will be described later.

Taking into account estimates of distance, suction, unknown slant of the chain, possible errors in taking the bearings, the collision and other elements, we do not think Mr. Hickson's placing of the Boston at the point of collision is subject to any important criticism. At any rate respondent did not see fit to bring in their own engineer with a chart of their own.

Main Ship Channel and Customary Anchorage

Before reading this section of the brief we ask the court to examine the chart again. Note the St. Helens Bar Range consisting of two lights Front F. R. and Rear F. W. at Columbia City. The rear fixed white light is placed considerably higher than the front fixed red light.

A vessel coming down the river after making a turn at the upper end of the St. Helens jetty is navigated to get on this range—that is, to get in position so that the white light is immediately or substantially over the red light. This tells the navigator that he is in the narrow dredged channel along the jetty. After running this range out he is about half a mile from the place where the accident occurred. He then ports his helm and follows along the Oregon coast without lights to guide him save a miscellaneous collection of range and town lights at Columbia City. He is now in a wide deep river, the ranges designating a channel along the Oregon shore. The river for half mile or more below the collision

place is also wide and deep. He follows along the Oregon shore, or a little out and to the right if he should be passing an upriver steamer, until the two fixed white lights of the Columbia City Range begin to close up astern. The lower and front of these two lights as he looks astern appears at first to his right of the upper rear light. After he gets on the Columbia City Range these two lights close up further until the rear light is directly or substantially over the front light. He is now going down stream on the Columbia City Range and will presently pick up lights ahead to guide him further.

Vessels were at the time of the collision frequently anchored just below Columbia City. Attention is invited to the yellow lines marked "Line F. R. 28-2 to F. R. 27-2," being the so-called "Red Range," "Line from Caples Point to Lamonts Light F. W." and "Line from Lamonts F. W. to Courthouse Flag." The court will note that these three lines tend in a general way to converge.

Now the ordinary way of anchoring at night at this point whether coming from upstream or downstream is to go a little below Columbia City where there is a big river in which to turn and maneuver and to come up on one or another of these yellow lines. The one most frequently used at the time was the Red Range. This was not a range at all. It was merely two fixed red lights,

the lower in altitude being at the lower end of the St. Helens Jetty (28.2 miles from Portland) and the upper at the end of a smaller jetty one mile up river or 27.2 miles from Portland. However, the pilots found it convenient to use these red lights in anchoring as they would have used a range in navigating, and gave it the name of the "Red Range."

The navigator would come up on one or another of these yellow lines, which he preferred under existing conditions, until his bridge was a little below or approximately abreast of the Columbia City Front Range Light F. W. There he would cast anchor with thirty fathoms of chain if the weather was mild or more if the wind was high. His vessel would pull with the current until the chain was taut. If the tide rose while his vessel was anchored he might swing to the Oregon or Washington side but he could not interfere with the main ship channel on the Oregon side or be in danger of shallow water on the Washington side.

The court will notice that as to a vessel like the Boston so anchored on the Red Range the bridge at the time of casting anchor would be at or a little below the first "O" in "Position." The anchor dropping from the bow would be 136 feet up river or about or a little below the end of the yellow dash. The vessel could then swing either way with the tide, even in a strong wind, without

damaging herself or interfering in the slightest way with the normal use of the ranges and channel.

This testimony on these matters includes four lines of questions, namely, (1) Where and how the witness anchored vessels off Columbia City; (2) Where and how the witness navigated that part of the river; (3) Where and how the other pilots anchored, namely, the customary anchorage; and (4) Where and how the other pilots navigated, namely, the customary channel. Not every expert in the case testified on all four questions but every expert testified on at least two or more of them. There was little difference of opinion among them except on minor details. The pilots employed by the Boston Maru testified mainly in favor of our contentions on these issues.

These questions are so interwoven in the testimony of the pilots that it seems best to take up their views separately and treat the questions together. First, however, the following summary may be useful:

1. *Where Witness Anchored.* Every pilot said he anchored on one or another of the yellow lines, except Sullivan and Gildez, who said they estimated the distance out from the Oregon bank. Sullivan, however, had not anchored at the locality at or before the time of the collision. No

pilot said that he had ever before or since anchored a vessel where the Boston Maru was placed. Most of the pilots anchored opposite the Columbia City front light. McNelly, Sandstrom, Dalby and Berry anchored a little below it. No pilot anchored above it.

2. *How Witness Navigated.* Every witness without exception used the ranges. They differed only slightly in the place at which they turned off the St. Helens range to get on the Columbia City Range. Captain Gildez said he did not use the ranges but it appeared that he did.

3. *Customary Anchorage.* All the pilots who testified on the subject said that the customary anchorage was over toward the Washington side or at the place where the yellow lines converge, except Gildez, who said the customary anchorage was in the middle of the channel. No pilot testified that it was customary to anchor where the Boston Maru was anchored, or that he had ever before or since seen a vessel anchored there. Dalby, who saw the Boston right after the collision said he had never in his life seen a vessel anchored there. Gildez tried to uphold his place of anchorage as proper but did not go so far as to say it was customary to anchor so as to permit a vessel to swing where the Boston Maru swung, and admitted that he had passed vessels at anchor there, always on the Oregon side of them. No pilot except Gildez testified that there was a custom-

ary anchorage ground any place else in that locality than over toward the Washington shore. Sullivan, although he had never used the red range, testified that he had not anchored there for some time before the collision but he knew of the red range and described how this range came into use for anchoring.

4. *Customary Ship Channel.* Every pilot except Gildez testified that vessels were customarily navigated past Columbia City on the Oregon side and he practically admitted it.

We now proceed to an examination of the testimony.

Captain Dalby (appearing in the record as "Baldy"), a witness for appellant, was coming up the river with the *Siersted.* After the collision the Keats under a full-astern bell, turned sharply starboard and came to a stop some distance below the place of collision. On seeing this maneuver Dalby stopped his engines and then received Berry's signal to pass to port. Not until then did he see the lights of the Boston (A 153). Dalby then came up substantially on the red range. All the lights of the Boston were on by this time and Dalby said she was 450 to 500 feet over.

He added (A 151):

> I never seen a ship anchored there in my life in clear weather.

Court: What kind of weather?

A. Clear weather, I mean not foggy.

Court: Do they anchor there in the fog?

A. In fog we anchor anywhere we can. Naturally a man coming down in the fog don't figure a vessel anywhere; we stop and get the headway off the vessel. *Some places along that river we have places to anchor, and generally swing to one side there and anchor. This is one of the places as long as the atmosphere was clear, as a rule, we go out to the anchorage grounds.*

Anchoring at night Dalby ordinarily comes up on the red range (A 146) to a point below Columbia City Front (A 157).

Q. Did other pilots anchor in that vicinity at times?

A. Yes, a mark we go by when we anchor the ship there to load or do anything out there. We figure easy for ships there to load timber, load off barges; sometimes too deep to load at Columbia City or St. Helens, and take there and anchor there. That is a mark we always use, also a mark on Lamont Bluff and St. Helens Court House. We leave the court house well open on Lamont bluff, but we generally as a rule use that red range as I say. It is very easy to pick up and very simple.

Q. What is that?

A. That is very easy to pick up and very simple to go onto out off Columbia City there.

Q. Have you ever passed other vessels at that portion of the river anchored there?

A. You mean anchored?

Q. Yes, anchored.

A. *Pass them anchored out there on these grounds I am telling you about.* (A 147)

. . . . .

Of course, the channel is over close to the Oregon shore. We come pretty well down to the Oregon shore there and make a turn to deep water there and turn to follow that shore more or less—to that shore, until we get down on to the ranges leading down to Morton Island on the other channel—the other course. (A 149).

We invite attention to Captain Dalby's cross examination (A 156-158). Its exact meaning is uncertain because the court is required to guess at just what the witness and counsel were pointing to on the chart. The witness made it clear, however, that the proper anchorage is not opposite Columbia City but below the town, also it is clear that the witness' practice is to anchor below Columbia City Front, although other witnesses stated that they anchored abreast of that light.

We suggest two simple experiments to determine what "abreast" of this light means. First

place a straight-edge on the Oregon shore, following its general direction at the location of that light. A line at right angles from the light would just about cut through the "s" in "position." Again place a straight-edge along the red range. A line from this range to the light would approximately cut the first "o" in "position."

The court will note how far these points are *below* the anchor of the Boston.

CAPTAIN SANDSTROM, a witness for appellant, said (A 159):

Q. Do you sometimes anchor vessels at some part of the river near Columbia City?

A. Yes, sir, I have at different times.

Q. Do other pilots anchor there too?

A. Yes, sir.

Q. How do you bring a vessel to anchor, opposite what place and at what distance and by what lights?

A. *We generally, as a rule, drop down below the front range of Columbia City ranges and come in on the red ranges of the jetties;* the red light on the lower end of the jetty is what we now know as the front light on the St. Helens range—or inside of that, down toward Caples point.

Q. I am not referring so much to the river as it is now, Captain, because changes

have been made as you know, but the river as it was two years ago, in October, 1924; you then anchored off of what is known as red range, didn't you?

A. Yes, sir, what we called red range, which was the lower end of the jetty light, forming range with the jetty light that extended up above; that formed a range and we would go on that or inside of that down towards Caples Point; was according to if we had swinging room, and anchored the vessels there for loading them on deep draft, when they couldn't have water enough at Columbia City or St. Helens.

Q. Have you seen in the past there, vessels anchored at that location?

A. Yes, sir.

Q. By other pilots?

A. Yes, sir.

Q. What can you say as to whether or not there is a custom with respect to anchoring there?

A. *That has always been the custom to anchor towards the Washington shore.* (A 159-160.)

. . . . . .

Q. Where is the main ship channel at that point for navigating up and down the river?

A. Well, the main ship channel you come down on these ranges until you get

about abreast of what we call the dock of the Western Spar Company, their mill there at Columbia City, before you start swinging for the lower course; that is just above the old —the front range or was the front range at that time of St. Helens range; just above that before you make the turn; you run approximately fifteen hundred to a thousand feet probably above it, before you start swinging; that brings you——

Q. You mean at about fifteen hundred to a thousand feet above the range light of St. Helens upper range you start swinging?

A. Yes, sir.

Q. And which way do you swing?

A. Swing to starboard; down towards Columbia City ranges; down to what we call Deer Island.

Q. What shore do you follow down to get to Columbia City range?

A. *You are on the Oregon shore.* (A 161-162.)

Captain Grunstad, a witness on behalf of appellant, was employed on the United States Columbia River Survey Boat before becoming a pilot. He said (A 174):

Q. Are you familiar with that part of the Columbia River opposite Columbia City, above and below there?

A. Yes, sir.

Q. Is there any anchorage ground in that vicinity?

Mr. McCamant: I think that is a conclusion, your Honor. I think this witness ought to be asked what is the customary way of anchoring vessels.

Court: Yes. You don't mean designated anchorage ground?

Q. I don't mean designated by law; I mean designated by custom. Is there any customary anchorage ground in that vicinity?

A. Yes, sir.

Q. Where is it, Captain?

A. Abreast of Columbia City.

Q. Front or rear?

A. Well, *front.*

Q. Abreast Columbia City or down?

A. Yes, Columbia City Ranges—what is called the Columbia City Ranges.

Court: What do you refer to as the Columbia City ranges, Captain? On the Columbia City side?

A. Yes, direct in the channel down to Columbia City.

Q. Is that customary anchorage ground nearer the Oregon bank or nearer the Washington bank?

A. *Nearer the Washington.*

Q. How do you ordinarily anchor a vessel at that place at night, assuming it is clear and you can see lights? Not assuming fog, or anything where you can't.

A. Well, set by the ranges, *red ranges that we use to anchor on,* and abreast of Columbia City range.

Q. Abreast of Columbia City range lights?

A. Yes, sir. (A 174-175.)

The witness then used the red range at night and anchored abreast of Columbia City Front. The court has noted that Sandstrom anchored below Columbia City Front. The majority of the pilots anchored abreast of this light and a few of them below it. None of them said they had ever anchored a vessel or seen a vessel anchored above it. Gildez placed the anchor of the Boston Maru about 400 feet above the light. Grunstad continued (A 99):

Q. Where is the ship's channel, main ship channel, at that part of the river opposite Columbia City?

A. *It follows the Oregon shore line.* (A 99.)

On cross examination Grunstad said (A 184):

Q. There is a customary anchorage ground in the neighborhood of Columbia City that is known to all the pilots, isn't there?

A. Yes, sir.

Q. And it is customary for vessels desiring to go in to St. Helens to anchor there, isn't it?

A. Yes, sir.

Q. And all of the pilots on the river know that?

A. Yes, sir.

Q. Do all the pilots anchor at the same place at Columbia City?

A. Yes, sir.

Q. They all do?

A. Yes, sir.

Q. *You never have seen a vessel anchored there except at the place you have indicated in your direct testimony?*

A. *No, sir.* (A 184.)

No pilot testified to having seen a vessel anchored there at any other point and Dalby said he had never before seen a vessel anchored where the Boston was.

Captain Berry, pilot of the West Keats, said (A 102):

State whether or not there are vessels anchored in that general locality from time to time by the pilots?

A. Yes, sir.

Q. Now, have you anchored vessels there yourself?

A. Yes, sir.

Q. How do you anchor vessels at a point generally opposite the Columbia City range lights at night?

A. I use the lower Columbia City range light; put that abeam out about twelve hundred feet or perhaps a little more; and at that time there was a red range that we anchored our vessels on, which would be the lower light of the St. Helens jetty, and a red light on another little jetty that came out just a little above the St. Helens jetty, on a dolphin.

Q. You speak of that as a red range?

A. Yes. (A 102.)

. . . . .

Q. That light takes you approximately how far out from the shore?

A. A good 1200 feet.

Q. What can you say as to the practices of other pilots anchoring vessels in that locality?

A. I would say they also do the same. I have come up many a time and found them anchored there. I could see they were there, because I could see this range, see the vessel anchored there.

Q. When you first made out the anchor lights of the Boston Maru to be the lights of

a vessel at anchor, state what was your judgment at that time as to the location of the vessel?

A. I supposed she was over on this certified anchorage.

Mr. King: What was that last answer?

A. *I supposed her to be over in this regular anchorage ground, where vessels are commonly anchored for taking on cargo from the water.* (A 103-104.)

Captain Berry (A 104-105) then described the ordinary method of running down the Oregon shore, leaving the St Helens Bar Range at a point about half a mile above the place of the collision and joining the Columbia City Range below it.

Captain Sullivan, a witness on behalf of the respondent, said direct (A 197):

Q. Is it possible for a pilot to anchor at any particular spot in the river after dark?

A. Well it is a very difficult thing, I have found from my experience, to drop ahead any particular spot, with the exception possibly *with the aid of some range or lights that we use especially for that purpose.*

On cross examination the captain said (A 133):

Q. At night, what is the part of the river more commonly navigated by pilots?

A. *The Oregon side.* (A 220.)

The captain said that in anchoring off Columbia City he would get out opposite Columbia City Front and anchor anywhere in the channel where the ship would have sufficient swing without striking her stern (A 221), and would guess the distance out from shore (A 228). On being reminded that there was a wider deeper river below that he replied, yes, but there were no lights to mark it by (A 222). Captain Sullivan said he had never used the red range but added (A 223):

> A. I never anchored a ship there after it was put in place; never had occasion to anchor it.

Incidentally it may be noted that the red range came into existence in April, 1923, through the establisment at that time of the fixed red light at jetty 27-2 (A 343). The red light at 28-2 had been established long before in 1919 (A 343). It seems unusual that Captain Sullivan had not anchored a vessel off Columbia City during the period of one and a half years between the establishment of the red range and the collision but we do not question the truth of his statement to this effect. The value of his testimony as an expert on the anchoring of vessels off Columbia City is somewhat weakened by his inexperience.

The testimony of the pilots produces conviction that in anchoring a ship at night in an expanse of water many miles long and three-fifths

of a mile wide from bank to bank, with the banks sometimes almost or entirely invisible and only lights for a guide, a pilot ought if possible to locate himself at least two ways. He should know his position up and down river and, even more important, he should clearly know it cross river. This means getting a line of lights up stream (since pilots ordinarily anchor with the bow up stream in spite of Gildez's attempt to anchor crosswise in the present case) and a light or line on the bank from which to gauge distance up and down river.

Now being abreast of Columbia City Front means one thing to a person on the shore and another to a pilot on the bridge of a moving ship. If the ship is lined with the current or the red range a pilot can readily tell when the light is abeam. If the ship is pointed in any other direction he cannot tell unless he knows how she is pointed. It is not surprising that Gildez having turned around three-quarters of a circle did not know he was 400 feet above the light when he cast anchor.

Every pilot in the case with the exception of Gildez and Sullivan stated the necessity of getting a line both ways. These two emphasized the necessity of getting a point on the bank and eschewed the river below Columbia City Front because of a want of lights there, but both of them said it was sufficient to guess at the distance out.

However, we suspect that both of them knew more than they testified. Gildez we think was just in a hurry to get to bed at the time in question and his testimony was the best argument he could advance in support of his anchorage. Sullivan, without an actual experience in anchoring at the point to fetter him, was merely giving testimony for the side that called him. He was not devoid of information about the red range but told the court more about it than any other pilot. We quote (A 224):

> A. My knowledge of that range is this: It seems that one of the pilots by accident discovered in anchoring a ship one night down there, where he was afraid the ship was going to swing over on the *Washington shore* when she swung around—noticed that these two light come in range at the point he was in; when the ship swung around *she cleared the shore and he had forty feet of water under the stern. So he told the other pilots* that when these two lights range, abreast of that fish trap, it is a good place to anchor; but I never happened to anchor a ship there until after that light was moved, and I don't know anything about it, or whether it is or not. Of course moving down the river any distance it would come off the range, but at that particular spot that he described probably they would range, if he said so, but it is not a range, though; not used as a range, or never was intended for a range. Of course if someone has worked that out and discovered those two will range in a certain spot in the channel, and if you

go out and find that spot, you can probably anchor a ship there; but I never had occasion to use it, in my experience, until after moved.

Q. Do you know the name of the pilot that made the discovery that those two lights were handy to anchor by at night?

A. Yes, quite well.

Q. Who is it?

A. His name is Chase.

Q. Chase. What is his first name?

A. Harry. H. L. Harry L. Chase.

Q. You believe that he was the originator of the use of those two lights?

A. That is the first I heard of it.

Q. Did he tell you about using the lights?

A. I don't know whether he told me directly or whether I heard it second hand. My impression is he told me directly.

Q. Can you remember pretty definitely what time this was?

A. No, I couldn't; but he would. He would have—he would have a record of it, and the ship he had, and all about it; but I don't remember. It is just an idea that pilots generally, if they find anything that might be of value to others, that they find themselves, they tell them, scatter the knowledge

around of anything that might be of importance. (A 224-225.)

. . . . .

Q. Do you recall anchoring any vessels there?

A. No, I don't.

Q. When did you last use that anchorage ground, do you remember?

A. It seems to me it was a long time prior to that; I don't recall. (A 230.)

Captain Moran, who was called as a witness by respondent, came down the river about 12 midnight with a vessel of two thousand tons burden and 23-24 feet draft. He left the St. Helens Bar Range about a half a mile above the usual point and about a thousand feet below the end of the St. Helens jetty (A 254). About that time (A 255) he made out the lights of the Boston Maru, which was then lying straight down stream.

He proceeded without aid of range lights past the Boston on the Washington side and picked up other lights a long distance down the river, thus saving himself some distance. His more usual practice was to leave the St. Helens Bar Range off the Columbia City mill (A 254). Asked about the red range, he said:

A. I never used the red range; what I generally used to use was the courthouse at St. Helens, and Lamont Point. I kept that

open a couple of hundred feet. That would leave me five or six hundred feet out, or probably more, than where the Boston Maru was anchored. I couldn't rightly say what distance it would be. but it would be five or six hundred feet further out. (A 256.)

. . . . .

If she was anchored out there about as customary to anchor, I would pass on the Oregon shore, in a case of that kind. (A 256.)

Moran said the customary ship channel was rather on the Oregon side (A 257).

Captain Allyn testified on behalf of respondent. His method of anchoring at night is to get his bow on Lamonts light and his stern on Caples Point with Columbia City Front abreast of his bridge (A 266).

As to the channel, he said (A 267):

A. Always follow down the Oregon channel when coming up this way.

Captain Allyn said (A 267):

Q. You would not anchor out just in the middle of the stream without knowing how far to one side or the other you were, if you could avoid it?

A. No, if there is any light so I could see; anyway to see, no: you have to have something to go by.

Q. And you would always take advantage of a light or something you could see, if you could?

A. Yes, always, foggy weather or any other time, always try to get near a light to anchor if possible. (A 267.)

. . . . .

Q. What can you say of the custom of anchoring vessels at that place? Other pilots anchor their vessels there too?

A. *Been anchoring there ever since I been in the pilot business.*

Q. They customarily anchor pretty well out from the Oregon shore over towards the Washington shore?

A. If possible. yes.

Q. So as to leave water for the channel?

A. Yes, the main object is to keep out of the main fairway as much as possible.

Q. And the Oregon shore has been the main ship channel for a long time, has it?

A. *Yes, always pass up and down the Oregon shore if possible, yes.*

Q. Have those two ranges, the St. Helens and the Columbia City ranges, been established for a long period of time?

A. They have been there ever since I have been in the pilot business.

Q. *So always been the custom to navigate the Oregon shore, and to anchor over towards the Washington shore?*

A. *Yes, sir.* (A 269)

Captain McNelly was called as a witness by respondent. He described the point at which he ordinarily turned off the St. Helens Bar Range being a little above where Berry turned (A 276. See marks on chart) adding (A 282) that that was his own method and all pilots did not run the river exactly alike. The captain said that in anchoring at night he used the red range, and added (A 278-279):

Questions by Mr. Snow.

Coming down the river then, if there is no ship at anchor you usually keep out pretty well towards the center, or even to the Washington side?

A. Aim to keep just about in the center.

Q. If there is a ship at anchor, do you usually aim to pass on the Oregon side, or the Washington side, of that ship?

A. Any ship that I have ever passed at anchor there, I have passed on the Oregon side.

Mr. McCamant: Coming down?

A. Coming down. Any ship that I ever remember of seeing anchored out there, I have always passed on the Oregon side coming down.

Testimony of Captain George McNelly.

Q. In fact, the customary anchorage is over towards the Washington side, isn't it?

A. I have always understood it that way, as a rule.

Q. And the customary ship's channel is over towards the Oregon side?

A. Well, the water is deeper closer to the shore on the Oregon side than it is on the Washington side; more sloping on the Washington side.

Q. In keeping out towards the center you give yourself plenty of water and keep to what you consider to be the starboard side of the channel you follow, don't you?

A. Yes, as long as there is no obstruction; no ships in there.

Q. You have passed ships at anchor there a good many times, have you?

A. Yes, sir. (267.)

Q. Several times at least?

A. Yes.

Q. Ordinary rate of speed. That is, do you maintain your speed in passing them?

A. Always have; yes.

Q. If you were going full speed you would not slacken in order to pass them?

A. Unless they had barges or logs alongside that the swells would do damage to; we would slow down for that reason, but no other reason.

Captain Chase, called as a witness by appellant, stated that in anchoring he came up on the red range abreast of Columbia City Front; that the range had been in existence 16 to 18 months before the collision and that he had used it before that time and told other pilots about it (A 297-298). He added (A 298):

Q. What is the customary anchorage ground at that locality?

A. That is customary, as far as I know, the description I gave you.

Q. Other pilots use the same method of anchoring?

A. I don't know what they use, I am sure.

Q. You have passed vessels at anchor there?

A. I have.

Q. Found them anchored over towards the Washington side?

A. *Apparently in the same place I anchor.*

Q. Where is the main ship channel at that locality?

A. All ship channel wherever it is deep.

Q. Do vessels navigating up and down the river, do they customarily navigate on the Washington or Oregon side at that point?

A. *Usually the Oregon side. I have—in fact very nearly all the time on the Oregon side.*

Q. That is on account of the ranges converging?

A. Yes, the range light is there; they come up and pick up the range and follow along that shore line, quite close along that shore line. (A 200.)

Captain Gildez has been employed in the navigation of Columbia River craft since 1910. At the time of the collision he had been for two years a Columbia River pilot. He anchored the Boston at 8:30 P. M.. October 25, 1924. He described the weather at the time as (A 307-308)

Dark. Yes, very dark. Cloudy and dark, squally and rain squalls.

Q. Could you see the shore?

A. Not very distinctly; you could see the lights.

There is considerable testimony that there was no fog that night and no testimony that there was fog. In a fog a pilot is probably justified in anchoring any place he can.

He says he came down river on the St. Helens Bar Range and turned to starboard until he was

abreast of the Columbia City Front Range Light heading for the Oregon shore, then let go the anchor (A 308). Evidently he turned around three-quarters of a circle, and it is not surprising that he misjudged his location up and down stream. His anchor was placed more than 400 feet above the light, considering the general trend of the shore. He says that he used no light or landmark to determine his location between the Oregon and Washington shores but dropped anchor at a point which he estimated to be 600 or 700 feet from the Oregon shore. His testimony on the latter point follows (A 330-331):

> Q. One of the times you testified before the inspectors, before you learned of the position of the Boston Maru as shown by the ship's bearings, didn't you express the judgment to the inspectors that you had anchored about six or seven hundred feet out from the Oregon shore?
>
> A. Yes, sir.
>
> Q. But you changed that opinion when a later location with bearings showed the Boston Maru to have been about nine hundred feet out?
>
> A. Yes, sir.
>
> Q. How did you arrive at that figure, six or seven hundred feet? Was that your estimate?
>
> A. That was my estimate that night.

Q. So you thought you were anchored about six or seven hundred feet out from the Oregon shore?

A. Yes, sir.

The court can readily demonstrate with a pair of dividers that if he had anchored six or seven hundred feet from the Oregon shore as he thought, the Boston would probably have gone aground shortly before the time of the collision. It makes no difference in this demonstration whether the place from which his estimate was made was the place where the anchor sank or the bridge on which he stood, 136 feet to the eastward.

Captain Gildez was then unfamiliar with the red range, although he had anchored in the daytime by putting Lamonts on the Court House (A 323). Why he should seek a guiding line by day and not by night is not explained. He alone of all the pilots testifying stated that the customary anchorage was in the middle of the channel (A 323), but while he has passed anchored vessels there while going both up and down stream he has always passed them on the Oregon side (A 232-233) and he admitted that it was customary to anchor far enough over to the Washington side to give clearance to navigating vessels (A 333). His testimony respecting the use of the ranges is also out of line and somewhat inconsistent. He said (A 327):

A. The main ship channel down the thirty foot contour not on the Oregon side at all.

Q. You knew the ranges there on the Oregon bank, didn't you?

A. No ranges at this place.

Q. You don't mean to deny the existence of the St. Helens Bar range and the Columbia City range, of course?

A. The St. Helens Bar range and the Columbia City range are not used after pass Columbia City.

Q. Not used?

A. Not used as ranges.

Q. They are not?

A. No, sir.

Q. So you think the pilot made a mistake if he used that?

A. I am not here to estimate what a pilot does. I am just saying what I would do.

Q. You want to be understood as testifying that Columbia River pilots don't any of them use that range?

A. I am not testifying for Columbia River pilots, sir.

Q. You said not used.

A. I am speaking for myself alone.

Q. You don't use ranges in navigating the river at that point?

A. No, sir. (A 328)

After this he was asked how he would bring a vessel down the river and replied (A 328):

A. Coming down we come on St. Helens Range to a point about abreast of these Columbia City Mill lights and head right off down the middle of the channel towards the lights at Kalama, until we picked up the lower Columbia City Range, and went off on that.

Q. How far would it be from the place that you would leave the St. Helens Bar Range until you would pick up the Columbia City Range below?

A. Quite a ways; half a mile I should judge.

Q. Half a mile?

A. I should say.

Q. There would not be more nearly a mile and a half, or two miles?

A. Might be that. (A 329)

We think Captain Gildez' explanation of his unusual anchorage is far from satisfactory. He tried to place his vessel close enough to the Oregon shore to ground her there but luckily misjudged the distance 200 to 300 feet. He tried to

put her opposite Columbia City Front but missed by over 400 feet. He eschewed the wide river below the light because he does not want to anchor by guessing (A 343) but he was willing to guess at the distance out from the Oregon shore.

Obviously Gildez did not use the same degree of care in anchoring as did the other pilots. Also, either his knowledge of the river is indifferent or his testimony lacks candor. We think that if the statute means anything it condemns anchorage of the kind in question.

The Alleged Shoal

The court is invited to examine the chart opposite Columbia City rear and note the circular line of dots indicating the six fathom line with sounding in feet inside and thereabouts. This area of water was termed throughout the case as the "Shoal." The record contains a few pertinent facts about the shoal and a quantity of speculation about it, some pertinent and some not.

In the center of the shoal there is a twenty-five foot sounding. This represents the depth at zero water. At the date of the collision the stage of the water was 1½ feet above zero (A 89). At extreme low water on the night of the collision there would have been 26½ feet of water at that point, if the sounding had been correct at the time. At extreme high water there would have

been 30.2 feet. At the time of the collision the water there would have been about 25 feet plus 1½ feet plus 2.2 feet of tide or 28.7 feet. On the night in question the deepest draft of the Boston was 26 feet 1 inch aft. Therefore she could have floated over the 25 foot mark (assuming the sounding to be correct) at any time at any stage of the water between the time of her anchorage and the next high water upon which she was to proceed to St. Helens. She could easily have floated over this point (even if there had been a shoal at the time) at any stage of the tide high enough to produce a back current.

The shoal consisted of gravel dumped there by a dredge during the week of August 6-14, 1921 (A 193). Mr. Hickson testified after being qualified as an expert on that subject that such a gravel dump would tend to stay there for "a year or so" but would gradually wear away (A 71). Captain Sullivan, who did not qualify as an expert on this subject, ventured the opinion that it would not wash away (A 201).

We think the court will regard Mr. Hickson's testimony on this point as the more credible and will conclude that there was no shoal at the place in question subsequent to, let us say, August 1923. At any rate it is inconceivable that the shallowest portions of the shoal were not gone by that time, or that there was any shoal left by October 1924, the date of the collision.

How then did the shoal come to be placed on a chart issued by the United States Engineers October 1924? Mr. Hickson explained this (A 69-70) and the same explanation is placed on the chart in the form of a note on the Washington side near the shoal. The entire chart with the exception of the corner with which we are concerned was made in 1924. The portion north of the white line indicated by the note was made from a survey of October 1921, two months after the dumping of the gravel.

No witness testified that he had ever seen or heard of a vessel, large or small, anchored or navigating, around on the shoal. Several testified definitely that they had never seen or heard of such an occurrence.

Many ships anchored at the grounds commonly used must have swung over the southerly and westerly portions of the shoal and it is thus clear in the record that the shoal did not render unsafe the usual anchorage on one or another of the yellow lines. In fact Captain Allyn, a witness for respondent, anchoring on the line between Lamonts and Caples Point must in order to avoid the turn in the Washington bank below have placed his vessel right on the edge of the shoal.

We have stated the facts concerning the shoal and the practical treatment thereof by the pilots. May we here suggest that this case involves navi-

gation and anchorage on a river—not on a chart. Some of us landsmen may have partially overlooked this obvious fact during the trial and the court, we believe, gave it insufficient consideration. On the chart the shoal looks like a lot with a fence around it. Actually it looks like the rest of the river, and a lead is always at hand to drop from any part of an anchored vessel at any time for an exact test of depth. Several pilots testified in effect that the lead is an important instrument in anchoring. Respondent elicited from pilots the information that Government charts are sent to the pilot office as they are issued and would perhaps have it appear that the filing of a chart in the pilot office is somewhat analogous to the filing of a deed for record in the county clerk's office. Obviously a pilot putting his vessel ashore through reliance on defective depths shown on a Government chart could not escape the blame, as his business is to know the river and not merely the literature about the river.

It should not be thought that Captain Gildez did not take up the shoal as an excuse for anchoring his vessel about 500 feet westward of and about 400 feet up river from the usual anchorage. and so close to the intersection of the ranges that she might easily have grounded on the Oregon bank if he had placed her where he thought he was placing her. He testified that he knew about the shoal (A 309) although he did not say that he had ever taken soundings there. He said that

he feared that the Boston might go aground on the shoal (A 319).

On direct examination Gildez testified that in anchoring off Columbia City you cannot tell which direction your vessel will swing unless there is a wind blowing and at this time there was scarcely any wind. Continuing (A 310):

> Q. Taking the conditions as you have described them up there that night, could you tell at the time you came to anchor which way your vessel would swing?
>
> A. No. sir.

On cross examination he admitted he had testified before the inspectors that from the way the wind was blowing when he lay down the vessel would swing toward the Washington shore; continuing (A 321):

> Q. I will ask you whether or not this question was asked and this answer given: You say a wind blew when you went to bed which would swing towards the Washington shore? A. "Yes, sir."
>
> A. Yes, sir.

On pages 321-2 will be found such explanation as he made why he testified one way to the inspectors and another to the court.

After some discussion as to the depth of water on the shoal the following occurred (A 327):

Q. Now by anchoring a little further down the stream you could very easily have avoided that shoal place, couldn't you?

A. Yes, sir.

Q. And anchoring further over towards the Washington shore, and further down, you wouldn't have been in any danger from that twenty-five foot sounding at all, would you?

A. No, sir.

Q. Even if she swung to the Washington shore?

A. No, sir.

A few minutes later he repudiated this statement as follows (A 331):

Q. In fact, if you had gone a little below and further out, you would have been just as safe with your own vessel and would have been entirely away from the fairway, wouldn't you?

A. Not in my estimate, no, sir.

Q. You would have been entirely away from the Oregon shore?

A. I would have been as safe—I would have been out of the way, probably, more, but my ship wouldn't have been as safe, or I wouldn't have known she was as safe as she was. (A 227)

Captain Sandstrom exhibited a practical consideration and use of the waters over the shoal.

He stated that he had sounded it and that as a rule he dropped lead when anchoring at a time when visibility of lights is poor and he is not quite sure of himself (A 161). He stated that light vessels in anchoring need pay no attention to the shoal but that deeper draft vessels should be placed further down (A 161). No pilot suggested that in order to avoid the shoal it was necessary to invade the intersection of the two ranges or otherwise move toward the Oregon shore. Captain Grunstad stated that a pilot anchoring on the red range would be safe from the shoal (A 186).

It will be remembered that these pilots had in mind anchorage opposite Columbia City Front or below that light and not above it. No pilot testified that he or any other pilot ever anchored above the light and there is no testimony that a vessel was ever anchored above the light other than the Boston Maru. *No pilot testified that the shoal had ever interfered at any stage of the water with the use of the customary anchorage.*

Dalby said that in anchoring he never paid any attention to the shoal (A 155). It will be remembered that he anchored on the red range by night a little below Columbia City Front.

Sullivan said he never heard of a vessel aground on the shoal and that pilots anchor well out from the Oregon side to keep away from the channel and ranges (A 231).

Nothing Done After Anchoring

We do not charge that the Boston did not maintain an anchor watch but do charge that an anchor watch which does nothing when something should be done is equivalent to no watch at all. If the Boston had been anchored at the exact position in which she lay at the instant of the collision and had been locked in this position by the use of a stern anchor we think the judgment of the trial court would have been different, yet in contemplation of law if that position would have been improper the night before it was improper at the instant of the collision. Whether the Boston lay there 6 seconds or 6 years would have been altogether immaterial if the position was improper. In fact the testimony of Chiga, Berry, Swenson, Gillette and Gildez as to her angle just before, during and just after the collision indicates that her stern was actually swinging either up or down stream at the instant the collision occurred.

On board the Boston nothing was done about it. The pilot was not awakened; no stand-by bell was given to the engine room; no stern anchor was let go to stop the swinging; no danger signal was given to the West Keats. Any or all of these things could have been done to get her out of her deceptive and dangerous position, since she started swinging with the tide thirty-four minutes before the collision, according to Chiga (A 566).

Captain Gildez on direct said that he instructed them to awaken him (A 312):

A. About one-two o'clock we were to leave.

What actually awakened him was the rolling caused by the collision. On cross examination he modified this statement (A 337):

Q. What instruction did you give the Japanese officers with respect to calling you?

A. Told them to call me if anything happened is about I all said.

Q. That is about all you said?

A. Yes.

Q. Did you tell them to call you in case of fog?

A. No. sir.

Q. You didn't use the word fog?

A. No, sir.

Q. Did you tell them to call you in case the vessel swung with the tide?

A. No, sir.

Q. Did you tell them to call you in case the vessel swung over to the Oregon side?

A. No, sir.

Q. Do you ordinarily, on anchoring vessels, Captain, go to sleep while the vessel is lying at anchor?

A. Yes.

Q. In a place where there is no more anchorage room than there is here?

A. Yes, sir.

Boston Maru's Position at Collision Controlling

There is no room for the suggestion that the Boston as originally anchored or as she was lying when the bearings were taken was placed where the collision would not have occurred. Those positions are stated and described only to show how the Boston came to be where she was when the collision occurred.

Her position at the instant of the collision, as nearly as it can be ascertained, is all important, and the case must be considered on that basis alone. It is exactly as if the Boston were originally anchored and locked in that position. It matters not how long the Boston was there. The cases to be cited tend to condemn her position at the instant of the collision and we do not know of authorities to the contrary. We are fully convinced that to uphold the position of the Boston at the time of the collision would be to disregard the plain word of Congress.

AUTHORITIES ON ANCHORAGE

Section 15 of the Rivers and Harbors Appropriation Act of March 3, 1899, 30 Stat. 1152, 9 FSA 60 USCS 9920, provides as follows:

> "That it shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft."

The Europe, CCA 9th, 190 Fed. 475.

This case emphasizes that the statute does not impose an absolute or unreasonable prohibition of the use of waterways for anchoring. This doctrine is correct within limitations. The limitations are, as pointed out in other circuits, that anchorage must be such as not to *obstruct, hinder, interrupt, embarrass, or deceive other navigators, or make their passage difficult, cause them to maneuver sharply, or interfere with the use of proper channels or the range lights marking them more than necessities require.* These limitations to the doctrine of *The Europe* cannot be overlooked since they are implied in the wording of the statute itself. The test is not whether the moving vessel could get by. It is whether the moving vessel is unduly impeded, obstructed, deceived, or caused to maneuver sharply.

The cases which follow discuss the several faults which we claim were committed by the Boston.

1. She lay across the intersection of the Government established ranges and in the ordinary line of navigation from one range to the other.

2. Her amidships was 400 or more feet above and 700 or more feet to the Oregon side of the customary anchorage.

3. Her stern was so close to the Oregon shore as not to admit of passageway for the West Keats between her and that shore although the channel designated by the establishment of the ranges and by custom lay along this shore.

4. The river off Columbia City is divided by establishment of the ranges and by custom of the pilots in two parts, a channel up and down the Oregon side and an anchorage on the Washington side below the town. The Boston disregarded the anchorage and placed herself squarely across the channel.

5. Her position at the time of the collision was such as to deceive a pilot navigating down river as to her location. The natural assumption was that she was in the anchorage and not in the channel. This assumption was made more reasonable by the bend in the river at that point, by the high Oregon bank tending to shade that portion of the river, and by the darkness of the night in question which permitted vision only of lights and little or none of the shore lines and water at the point.

6. The Boston did nothing after she started to swing with the tide to protect other shipping by use of either her stern anchor, engines or whistle.

The Caldy, 153 Fed. 837.

The Caldy was held improperly anchored since she was lying directly across the channel. Her stem was about 114 feet northward of mid-channel and her stern not more than 100 feet from the southern bank. It was argued that other vessels had successfully passed her both before and after the collision.

> . . . for as she was anchored some distance north of mid-channel, the wind from the north holding her across the channel, she naturally caused other vessels entitled to the southern side to fear to attempt to pass to the north because of the unknown length of her anchor chain, and she rendered the southern side at least hazardous, *as was demonstrated by the three vessels that did succeed with difficulty in passing and by the one that made the effort and failed.*

The Hilton, 213 Fed. 997, 1000.

The Hilton's anchorage was held improper.

> . . . There was certainly no necessity for her so monopolizing the channel either because of the lack of other location, a crowded harbor, or of existing weather or other conditions. Moreover, she should, if necessary so to anchor where she did, have used both her

stern and bow anchors in order to keep the vessel parallel to, or nearly with, instead of across, the channel.

The Itasca, 117 Fed. 885.
The Bern, (2nd C. C. A.) 255 F. 325.

Anchorage in Violation of Custom or Regulation

Many cases held that anchorage contrary to local custom or regulation is in violation of the statute. It matters not whether it is custom or regulation which is departed from.

Culbertson vs. Shaw, 18 How. 584, 586.

This was a moorage case in which both custom and regulation were charged.

> Whether a rule on this subject be established by an ordinance or general usage is immaterial; if the regulation has been so made as to be generally known.

United States vs. St. Louis Co., 184 U. S. 247.

Government war vessels anchored without notifying the Harbor Master as required by New Orleans ordinances and in an unusual place. The collision occurred before the passage of the statute in question. Holding the anchorage improper, the Supreme Court said:

> It is negligence for a vessel to moor so near the entrance to a harbor that shipping,

entering in stress of weather, is liable to become embarrassed by its presence; . . .

The Sanford-Strathleven, 203 Fed. 331, 213 Fed. 975.

Anchorage of the Strathleven was held improper.

. . . The regulations of the Harbor Commissioners in so many words forbid vessels to anchor in the channel; this prohibition impliedly extends to anchoring so as to obstruct the channel. The court below finds that neither authority nor usage has designated any specific anchorage grounds, and the implication from much that is said in the learned and elaborate opinion is that the port regulations referred to have been but indifferently enforced or obeyed. *Suffice it on this point to say that vessels anchoring in places forbidden by local law or custom must take the consequences of their own improper acts.* The Clarita and the Clara, 23 Wall. 1, 23 L. Ed. 146; United States v. St. Louis Transportation Co, 184 U. S. 255, 22 Sup. Ct. 350, 46 L. Ed. 520; Culbertson v. The Southern Bell, 18 How. 586, 15 L. Ed. 493; The Annasona (D. C.) 166 Fed. 803.

Graves vs. Lake Michigan Ferry Co., 183 Fed. 378.

. . . The testimony is conflicting whether anchorage off Sherwood Point was or was not customary or deemed safe or unsafe, within or without the usual course of navigation;

but the evidence is convincing, if not undisputed, that the other side of Sturgeon Bay affords both abundant and better anchorage ground for vessels; and the master of the Mingo, who fixed the anchorage place, had not visited Sturgeon Bay for ten years prior to his present trip. We believe both masters were mindful of a convenient place to be taken in tow, and not of better anchorage ground to leave clearance for navigation, and that the testimony is sufficient to support the finding that the Wilson was at fault, in the follwing particulars: Their anchorage in the fairway, for days and nights, if not negligence *per se,* was an obstruction without reasonable cause—and possible menace in darkness or thick weather—to free passage of vessels on a much frequented course. While the testimony is conflicting (as above mentioned) whether it was a reasonable and customary for vessels to lie at anchor off Sherwood Point, it is far from satisfactory that it was either reasonable or usual to thus anchor in the course, or that navigators were chargeable with notice that such anchorage was to be expected.

The Admiral Cecille, Compagnie Francaise vs. Burley, 134 Fed. 673, 676.

. . . Both locations are unnecessarily near to the track of vessels entering and leaving the waterway, and this is so because there is in the harbor of Tacoma an abundance of room for anchorage at a safe distance from the track of vessels coming into and leaving the wharves and docks; and the circumstances

above narrated do not, in my opinion, afford a reasonable excuse for the action of the tugboat manager in anchoring the bark within the prohibited zone. He knowingly violated a reasonable regulation prescribed by lawful authority, and for the consequences of his act while in the service of the bark as a local pilot the bark is liable to respond in damages.

ANCHORAGE ON OR NEAR RANGE WRONGFUL

City of Birmingham, 138 Fed. 559.

We cannot resist the conclusion that if the bow of the dredge as she lay on the bottom of the river had been turned so that she was parallel with the *range line,* her distance from the line would then have approximated closely to that distance prior to the collision . . . . The district judge found that the dredge was about 200 feet south of the center line of the channel and we are satisfied that this conclusion is substantially correct. The overwhelming weight of testimony establishes the fact that she could not have been nearer than 150 feet to the center line, or farther than 225 feet from it, and we think this finding sufficiently presents the remaining question, namely, was the dredge at fault in anchoring where she did?

. . . . .

(559)

The act of March 3, 1899, c. 425, 30 Stat. 1152, Par. 15 (U. S. Comp. St. 1901, p. 3543), provides "that it shall be unlawful to tie up or anchor vessels or other craft in navigable

channels in such a manner as to prevent or obstruct the passage of other vessels or craft." It seems to us that a dredge anchored at night 200 feet from the center of the channel of a narrow river, where a seven-foot tide ebbs and flows and within half a mile of a sharp bend, is within the mischief if not within the strict letter of the statute. Such a craft does not prevent navigation in the sense of stopping it altogether, but by crowding all navigation practically into the northern half of the channel she obstructs the passage of other vessels; that is, she hinders, impedes, embarrasses and interrupts their progress.

. . . . .

. . . Placing the dredge within 200 feet of the center line added a new and wholly unnecessary complication to a problem already sufficiently perplexing. The courts should not encourage laxity and shiftlessness by rewarding a master who places his craft in a position of danger simply because it is too much trouble to place her in a position of safety. Where human life and property are at stake, the consequences flowing from a dereliction of duty are so momentous that the courts should not permit considerations based upon convenience alone to be used as an excuse by one who failed to take every reasonable precaution to insure safety. A finding in favor of the dredge will place a premium on carelessness.

The Milligan, 12 Fed. 338, 340.

While the sloop was not lying upon the range of lights, she was dangerously near it,

—*subjecting passing vessels to the exercise of unusual care.* The position was not forced upon her; she might have anchored lower down, (before reaching it, or by floating back when the tide turned.) She would thus have been out of the way, and out of danger. Her anchorage so near the center of a narrow channel was inexcusable.

The Belfast, 226 Fed. 362.

I accordingly find that the Wayne, when struck, was lying at anchor nearly in the center of the channel, in the commonly used part thereof, *a short distance westerly in a line about parallel with the South Boston range from where she sank. She was swinging almost squarely across the channel,* and in connection with other barges anchored near her, but farther north, so obstructed the northerly half of the channel as to make navigation through it impracticable.

. . . . .

The determination of the place where the collision occurred disposes of the Wayne's contention that she was free from fault. She had taken no adequate care as to her place of anchorage. She lay a considerable distance outside the prescribed anchorage ground, nearly in the center of a channel which has been held by this court to be a narrow one (see the Schooner Baxter, The Vera, and the Melrose, 226 Fed. 369), where she had no right to be.

. . . . .

The law applicable to the foregoing situation has been so fully covered in other cases

that extended discussion of it here is unnecessary. See The Vera and The Melrose, 226 Fed. 369, Dodge, J., Sept. 14, 1912; The Georgia (D. C.) 208 Fed. 635, 644, The City of Birmingham, 138 Fed. 555, 71 C. C. A. 115; The Strathleven, 213 Fed. 975, 130 C. C. A. 381; The Hilton (D. C.) 213 Fed. 997. The Wayne was "obstructing" the passage of vessels in the channel, as that word is defined in The City of Birmingham, *supra.*

> "An anchored vessel, that can be clearly sighted and readily avoided by a slight change of wheel, may not be an obstruction, but when she can with difficulty be sighted, and when she requires other vessels on their usual courses to stop or to maneuver sharply, she may be considered an obstruction." Brown, J., The Georgia, *supra.*
>
> . . . . .
>
> *. . . While she was not directly on the South Boston range, she was so near it as to interfere with and imperil vessels following that course in the ordinary way.*

LACK OF PRECAUTION BY ANCHORED VESSEL

The John H. Starin, 122 Fed. 236.

The act of March 3, 1899, c. 425, 30 Stat. 1152, Par. 15 (U. S. Comp. St. 1901, p. 3543), provides, "That it shall be unlawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft." The courts have frequently held that the precautions taken by a vessel voluntarily

anchoring in a dangerous position should be commensurate with the perils assumed. The Clara, 102 U. S. 200, 26 L. Ed. 145; The Sapphire, 11 Wall. 170, 20 L. Ed. 127; The Worthington (D. C.) 19 Fed. 836; Toss vs. Trans. Co., 43 C. C. A. 538, 104 Fed. 3302; The Ogemaw (D. C.) 32 Fed. 919, 926.

The Ogemaw, 32 Fed. 919, 926.

Anchorage of the Richards was held proper. The Ogemaw was in collision with her on account of an attempt to cross her bows. The Ogemaw was of course held at fault. The court, however, held the Richards also at fault for failing to take seasonable steps to prevent the collision.

The second mate knew there was danger when the Ogemaw was abreast of the Richards, for he says he hailed the men on the deck of the Ogemaw, and told them to keep away, and that he hailed the barges in tow, warning them to keep their wheels hard aport. No effort was made to run out more anchor chain, thus allowing the vessel to drop down the stream with the current. In fact, nothing was done on the Richards to avoid the collision, except to hail the passing vessels, and put the wheel of the Richards to port when the collision was unavoidable. More effective measures might have been taken to avert the disaster which resulted.

Summary of Contentions Respecting Boston Maru

The above authorities we think condemn the position of the Boston at the time of the collision on several different grounds. In the first place she was there through two accidents. Gildez tried to put her opposite Columbia City Front but got her more than 400 feet up stream. Also he tried to put her 600 or 700 feet out and got her about 900 feet out. We think the testimony clearly condemns the practice of anchoring in that part of the river by merely guessing the distance out from a light on the shore, except in cases of fog. Gildez guessed twice and was wrong both times. This alone would appear to condemn the anchorage.

But at the time of the collision the amidships of the Boston was at least 700 feet westerly and over 400 feet southerly from an anchorage ground established by testimony of all the pilots as the customary anchorage. There was no suggestion of lack of uniformity or general knowledge of the practice of anchoring over to the Washington shore on one or another of the yellow lines. That locality had been used for anchorage for a long time. Captain Allyn, one of respondents own witnesses, said they had been anchoring there ever since he had been in the pilot business. Captain Gildez pretended that he did not know of this custom but admitted he

had always passed vessels anchored there on the Oregon side of them. If he did not know of the custom, in view of the testimony concerning it, his ignorance was inexcusable.

Let us pause to comment on the effect of placing the Boston over 400 feet above Columbia City Front. The court will remember that no pilot testified he had ever seen or heard of a vessel anchored above this light other than the Boston Maru. The majority of the pilots testifying said that they anchored opposite the light although two or three of them said they went below it, especially with large vessels. All of the testimony on custom tended to place the anchorage opposite or below the light. Gildez tried to anchor opposite it but blundered in turning three-quarters of the way around a circle and got 400 feet above it.

Now suppose Gildez had guessed right and had got opposite the light but no further out from the general contour of the Oregon shore. By using dividers on both the large and small charts the Court can determine about how far his stern would have been from the six fathom line. Leaving about twice as much slack in the chain as Hickson has left, the distance of the Boston's stern from the six fathom line would have been more than 200 feet instead of about 50 feet as appears to have been the actual situation. The conclusion under the testimony is ir-

resistible that if Gildez had anchored opposite the light and no further out than he did from the light from which he estimated the distance, the Keats would have passed by safely.

Again, the Boston at the time of the collision was squarely across the main ship channel at the intersection of two ranges. A more dangerous and deceptive position could hardly have been selected. If the Boston had been across a range extending up river Berry could have appraised her location at a considerable distance and governed himself accordingly. But she was partly around a turn from the St. Helens Bar Range and Berry could not head toward her until after leaving that range. The high Oregon bank made accurate vision more difficult. All these things Gildez knew or should have known. A pilot who disregards a customary and comfortable anchorage to place his vessel across a channel marked by ranges is doubly negligent when he selects a point midway between ranges where a high bank and a turn both tend to obscure her position from craft lawfully using the ranges.

We can think of no possible excuse short of illness for a pilot lying in bed asleep when his vessel is lying across the regular channel at night. There are perhaps circumstances under which Gildez might have lawfully placed his anchor where he did—under which indeed he might conceivably have placed and locked the Boston ex-

actly where she was at the time of the collision. But can we imagine excusing a pilot's being asleep with his vessel in that precarious position?

The stern of the Boston was close to the Oregon shore. Testimony as to the anchorage coupled with the testimony as to the starboard helm of the Keats and the suction establishes this beyond question. Yet the routine manner of passing vessels at anchor off Columbia City is between them and the Oregon shore. This alone we think establishes the fault of the Boston in view of the wide space for anchorage at the point.

When the Boston started to swing across the intersection of the ranges it would have been comparatively simple to have thrown out a stern anchor or to have brought her main engines in commission to keep her out of a dangerous locality. She had thirty-four minutes from the time the current started to back up stream in which to do something, yet nothing was done. The fault here was that of second mate Chiga or Captain Gildez or both. While Gildez is indefinite as to instructions to Chiga it would appear that he left instructions to call him if anything happened, leaving him to judge what "anything" meant. During the last seven minutes before the collision it should have been known on board the Boston that the West Keats was approaching and it should have been assumed that she was follow-

ing the usual channel. The precarious and dangerous position into which the Boston was drifting should also have been known. It would have been easy to warn the West Keats by whistles, bells or whatnot and a warning given soon enough would have avoided the collision. Yet nothing was done either to keep the Boston from drifting into her dangerous position or to get her out of it or to give warning.

If Gildez had deliberately placed and locked the Boston in the position she held at the time of the collision his misconduct would have been so gross as to call for severe penalties. Since our libel does not ask anything in the way of punitive damages this case must be considered exactly as if he had done so. What more need be said to condemn the anchorage. We feel that the fault of the Boston is established far beyond a reasonable doubt. To uphold the anchorage is to scuttle the statute.

Burden of Proof on Boston Maru

Assuming wrongful anchorage on the part of the Boston it is clear under the authorities that the burden of proof is upon her to show that any fault of the Keats contributed to the accident. There is a rule finding much support and some dissent in the authorities that where a collision occurs between a vessel at anchor and another in motion the presumption of negligence is upon

the moving vessel, 11 C. J. 1170-80. For a variety of reasons, however, where the anchored vessel is improperly anchored she must in order to divide damages show by a preponderance of testimony that the moving vessel was at fault.

The Clara, 102 U. S. 200, 202.

The Newell was at anchor and the Clara ran into her. The court held the Newell solely at fault and exonerated the Clara.

> Looking at the case in the light of the findings of fact, no fault whatsoever, of omission or commission, is imputable to the "Clara." It is true it was her duty, under the circumstances, to enter the breakwater and proceed to her anchorage with the greatest care and circumspection. Culbertson v. Shaw, 18 How. 584.
>
> *Whether there was any failure on her part to comply with this requirement is not shown. But the maxim applies Quod non apparet non est. The fact not appearing is presumed not to exist.* The libellants brought the case into court and thus assumed the affirmative. The burden or proof rested primarily upon them. If in this or in any other respect there was delinquency on the part of the respondents, it was for the libellants to prove it. As the case is presented to us in the record, the "Clara" must be held entirely blameless.

The John H. Starin, 122 Fed. 236.

The Burney was anchored in the middle of an 800 foot channel and was run into by the Starin. The court held the Gurney solely at fault.

> For these reasons we conclude that the Gurney was at fault and that the fault was the proximate cause of the collision.
>
> . . . . .
>
> *Having thus found sufficient cause for the collision it is not necessary to pursue the discussion further.* The Gurney's negligence having been clearly proved it is necessary for her to establish the Starin's fault by proof of equal cogancy. The City of New York, 147 U. S. 72, 85, 13 Sup. Ct. 211, 37 L. Ed. 84.

The Prudence, 212 Fed. 537, 540.

The court held the Hodges solely at fault for improper anchorage (540).

> . . . From all the evidence I cannot see how the Hodges could have been anchored for the night in a place where she was more likely to obstruct the navigation of the river by tugs towing other craft. If she had gone below the ranges, she would have been in an entirely safe position because the vessels upon leaving the ranges steered to starboard, and she would thus have been entirely out of the way of navigation.
>
> . . . . .
>
> . . . *The fault of the libelant in anchoring in that position overcomes the presumption in favor of an anchored vessel* when struck by

a vessel in motion. The schooner was anchored in an improper place, and her owner must take the consequences which fairly result from his own act.

The Miner, 260 Fed. 901, C. C. A. 6th.

The Halcyon had been moored at a dock for more than a year at the same place where she was when the collision occurred. The master of the moving tug had been many times up and down the river and must have known her exact location. The court held the moorage improper and also held that the tug was at fault.

. . . The vessel at anchor being in a proper place in case of collision, the presumption of fault lies against the vessel in motion; *but this presumption does not obtain when the anchored vessel was where she should not have been.* The prima facie fault of the anchored vessel may be overcome by competent proof that its anchorage could not have been the sole cause of the collision. In such circumstance the burden is with the anchored vessel to meet and overturn the presumption by proof of actual fault or want of reasonable care on the part of the moving vessel. The Europe (D. C.) 175 Fed. 596, and cases cited.

We think the court below was warranted in decreeing that the houseboat Halcyon was moored at a dangerous place, and affirmance must follow as to the non-liability of the tug J. L. Miner, unless it clearly appears from a

decided weight of the evidence that the tug was also at fault. We have carefully considered the evidence and exhibits thereto, and we cannot escape the conclusion that it does so clearly appear.

The Europe, 175 Fed. 596, 190 Fed. 475.

We believe that the rule now contended for is already adopted in this Circuit. The opinion of Judge Wolverton affirmed by the Circuit Court of Appeals is a fine illustration of the care and depth of the late jurist. We quote (175 Fed. 607):

> . . . The rule is, as it respects a vessel at anchor in the fairway, that she must take precautions commensurate with the danger she presents to shipping. If the danger is great, the care to prevent collision and accident from other ships navigating the water should be correspondingly great. If of lesser moment, the precaution may be diminished accordingly. The John H. Starin, 122 Fed. 236, 58 C. C. A. 600.
>
> It is a rule that a moving vessel must keep out of the way of one at anchor. This because the one at anchor is practically helpless, and is usually so conditioned as to be unable to relieve herself readily in stress of emergency. The rule is applied with great strictness, the vessel at anchor being in a proper place. In such case the presumption of fault lies against the vessel in motion. *This presumption, however, does not obtain where the anchored vessel was where she should not have been.* A vessel anchored

where she should not be must take the consequences of her own improper act. But in any event, whether she be in a proper place or not, or whether properly or improperly anchored, the moving vessel must avoid her, if it be reasonably practicable and consistent with her own safety. In support of these several propositions see 1 Parsons on Shipping, 573, 574; The Clarita and The Clara, 23 Wall. 1, 23 L. Ed. 146; The Virginia Miller, 76 Fed. 877, 22 C. C. A. 597; Ross v. Merchants' & Miners' Transp. Co., 104 Fed. 302, 43 C. C. A. 538.

The Belfast, 226 Fed. 366.

The Wayne was improperly anchored and the Belfast was outbound on the left side of the channel.

. . . Article 24 of the Inland Navigation Rules is a rule of the road and defines the respective rights of moving vessels in narrow channels. As against a vessel entering through this channel, the Belfact was bound to keep her starboard side of it. Her rights on the other side of the channel were inferior to those of the entering vessel. *But as against a vessel not proceeding, but wrongfully lying at anchor there, the Belfast's right as a traveling vessel was superior in any part of the channel.* The John H. Starin, 122 Fed. 236, 58 C. C. A. 600.

Graves vs. Lake Michigan Co., 183 Fed. 378, C. C. A. 7th.

The court held the Wilson improperly anchored and the vessel improperly navigated.

> In admiralty the rule is settled: That the moving vessel must keep away from a vessel properly anchored and lighted, and collision in such cases raises a presumption of fault against the vessel in motion, placing upon her the burden of exonerating herself from blame for the collision. The Virginia Ehrman and the Agnese, 97 U. S. 309, 315, 24 L. Ed. 890; The Oregon, 158 U. S. 186, 192, 15 Sup. Ct. 804, 39 L. Ed. 943, and cases cited. *The authorities are numerous, however, that the general law of the sea becomes applicable to such collisions, when the anchored vessel is improperly moored in the fairway or otherwise appears at fault.* (Ross v. Merch. & Miners' Transp. Co., 104 Fed. 302, 303, 43 C. C. A. 538; City of Birmingham, 138 Fed. 555, 559, 71 C. C. A. 115; The Scioto, Fed. Cas. No. 12,508, 2 Ware. 360, and notes); and we believe it to be unquestionable that evidence of negligence on the part of the anchored vessel, either as sole or contributory cause of the collision, establishes a case within the general rules of admiralty as to liability for damages.
>
> *The Sanford-Strathleven,* 203 Fed. 331, 334, 213 Fed. 975.

The court held the Strathleven's anchorage was improper and the Sanford was improperly navigated. The District Court had held the Strathleven solely at fault. We quote from the

District Court's statement of the law, bearing in mind that he was reversed on the facts. The higher court did not discuss the question of burden of proof.

> For a collision thus brought about, she is not entitled to, and cannot claim, the privileges of an anchored vessel, as between herself and other shipping lawfully using the harbor, which had no reason to anticipate danger arising from the unusual and improper character of her movements. Culbertson v. The Southern Belle, 18 How. 584, 587, 15 L. Ed. 493; The Clara, 102 U. S. 200, 202, 26 L. Ed. 145; United States v. Transportation Co., 184 U. S. 247, 255, 22 Sup. Ct. 350, 56 L. Ed. 520; Marsden on Marine Collisions (6th Ed.) 479, and cases cited; Spencer on Marine Collisions, Pars. 99, 106; Hughes on Admiralty, 261, 262.
>
> The obstruction of the channel, in the view taken by the court of this case, was in plain contravention as well of the state statutes and harbor rules and regulations applicable to the waters in question, as the federal statute on the subject.

We think the evidence irresistibly condemns the anchorage of the Boston at the time of the collision as improper. Assuming we are only partly correct and a preponderance of the evidence shows the Boston at fault then we contend and believe the above authorities fully demonstrate that the burden of proof falls upon the

Boston to show by a clear preponderance of testimony that the Keats was also at fault. If she has done so we think the damage should be divided. If she has not done so we think the entire cost should be borne by the Boston.

There are several reasons why this burden is upon the Boston if her anchorage was improper.

1. The owners of the Boston are libelants and to get affirmative relief and damages they must prove negligence on the part of the West Keats. This is fundamental. The owners of the West Keats are also libelants and it is conceded that they must show fault on the part of the Boston to recover. The rule works both ways.

2. The rule that there is a presumption of negligence against a moving vessel in favor of an anchored vessel applies only when the latter is properly anchored.

3. The Boston at the time of the collision was violating a statute of the United States designed to prevent collisions, namely, the Act of March 3, 1899, making it unlawful to tie up or anchor vessels in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft.

4. The fault of the Boston commenced at an earlier time than that charged against the Keats and continued to the time of the collision. *The*

Nereus, 23 Fed. 448. The Nereus and Jamaica were in collision through misunderstanding of signals. As they were headed toward the collision the Nereus gave another signal for the Jamaica to go astern and claimed that because the Jamaica did not obey, the entire fault was hers. The court said that it was not sufficiently shown that the Jamaica could thus have avoided the collision and that the faults of both vessels were proximate. Judge Brown said:

> In applying the above rule in particular cases, whenever it is sought to relieve a vessel from the consequences of a previous fault tending to produce a collision, the burden of proof is certainly upon her. She must satisfy the court beyond any reasonable doubt, not merely that the collision, notwithstanding the previous fault, might possibly have been avoided by the other vessel, but that the mode of avoiding it suggested was timely, and would have been adopted, under the particular circumstances, by a pilot of ordinary skill and judgment.

5. The fault of the Boston Maru is sufficient in itself to account for the collision and therefore since the Boston charges that fault on the part of the West Keats was a proximate cause the burden is on the Boston to prove the charge.

The Oregon, 158 U. S. 186, 197.

The Oregon through negligence of its officers was in collision with a vessel properly anchored.

Charges were made respecting the lights of the anchored vessel. The court said that the negligence of the Oregon was proved by a preponderance of testimony and was sufficient to account for the collision, consequently the burden was on her to show that the anchored vessel was at fault. In the cases cited above the same rule was applied in favor of moving vessels against vessels shown by a preponderance of testimony to have been improperly anchored. This rule is most clearly stated in *The John H. Starin, The Clara* and by Judge Wolverton in *The Europe,* all supra.

The West Keats

There is no dispute in the record as to what Captain Berry, pilot of the West Keats, did. The dispute as to the conduct of the West Keats takes the form of speculations and arguments as to what Berry might have done that he did not do. Berry's testimony and the depositions of Second Officer Gillette, Captain Swenson, Chief Engineer Bergreth, Second Assistant Jett, and Quartermaster Gidlof are undisputed in the record and are substantially harmonious.

Captain Berry was 48 years old at the time of the trial. Thirty of these years he had spent working on the Columbia River as deck hand, mate, master and pilot. Eighteen years before the collision he had received his unlimited Columbia River Pilot's license from the Govern-

ment. He became a member of the Pilots' Association in 1921 and received his state branch license in 1922 (A 27, 28).

The Keats is a single screw steel steamship of 410.5 feet length, 54.2 feet beam and 8,800 dead weight tons. Berry went aboard her at Terminal 4 of the Port of Portland at St. Johns in the evening of October 25th. At about 11:10 P. M., fully loaded and drawing 23 feet eight inches forward and 25 feet 8 inches aft (A 393), he took her out of the terminal and headed her down river. On entering the Columbia River her engines were set at full speed ahead where they remained until one minute before the collision. Approaching Columbia City she passed Warrior Rock, made the turn at the head of the St. Helens jetty, got on the St. Helens Bar Range, and came down the narrow dredged channel alongside the jetty.

The uncontradicted testimony of several witnesses will advise the court of some very pertinent facts concerning the handling of the Keats and other vessels of her class.

The Keats steers best at full speed ahead. The faster turning of the propeller sends a stronger flow of water backward past the rudder. Moving ahead with her engines stopped she is not readily dirigible.

The Keats backs to port. When her engines are backing her stern is thrown to the port and

her bow to starboard regardless of what position her rudder may be in.

The Keats when turning on a port or starboard helm tends to sag, that is, she turns slowly at first and the longer the helm is held in position the sharper becomes her angle of curve.

In order to stop the West Keats it would be usual to take nearly two miles and nearly half an hour to the maneuver. It could be done more quickly, especially in a wide basin, but the quicker method would not be resorted to except in necessity.

With her engines stopped, if the vessel was moving full ahead, it would take her a long time to come to a halt and she would travel three or four miles in the process if kept straight ahead. But she would be more or less unmanagable.

Accustomed as we landsmen are to four wheel brakes it is hard for us to realize the utterly different problems which confront a pilot operating thousands of tons of ship and cargo through the water with only a small propeller and a small rudder for power and steerage.

Doubts as to the speed of the Keats were set at rest by Gillette (A 409-410) who measured the nautical miles from the mouth of the Willamette to the point of collision and applied the same to

the time, showing an average speed of 8.84 nautical miles per hour. We may perhaps assume that her speed was greater at first when she had the aid of the current and gradually slackened as the rising tide first caused a slackening and stoppage of the current and later a slight up stream current. The one minute stoppage of the engines would affect her average speed for the total distance negligibly.

The night was very dark but not foggy. The sky was overcast with occasional light rains. Lights were clearly visible but the shore lines were practically invisible (A 95, 352). Shortly before and about the time of the collision Berry could see the dark line of the high bank on the Oregon shore but in a vague way. He says (A 114):

> Q. Could you see the loom of the bank on the Oregon side about the time of the collision, about the time you were approaching the Boston Maru?
>
> A. No, sir, you couldn't make out the shore to speak of at all. It was a dark bank along there, which looked very close, but you couldn't discern any trees or anything like that.
>
> Q. You say you could see the bank?
>
> A. Well, you could see a dark line along there.

Perhaps because of the shadow of the high Oregon bank testified to by several pilots Berry could see little or nothing of the water ahead of him as he tried to run between the Boston and the Oregon shore. He knew the shore was close and felt the effect of the suction but gauging the distance between the Columbia City Front Light, 200 feet back from the shore line, and the stern riding light of the Boston he thought until immediately before the collision that the distance was great enough (A 352).

As he continued down the St. Helens jetty, Berry saw ahead of him the group of lights constituting range, town and shore lights and the two riding lights of the Boston Maru. As he came to about the end of the jetty at the point marked with a cross he made the lights of the Boston, that is, recognized them to be the riding lights of a ship at anchor more or less across the river. He assumed her to be located at the regular anchorage.

He ran out the St. Helens Bar Range to a point about half a mile from the point of collision. This point is marked with a red cross. Here he turned to follow the usual channel down the Oregon shore in order to pick up the Columbia City Range below. He gave the order port a bit which was obeyed (A 107). The vessel answered and presently he gave the order steady (A 107).

He had now made the slight turn and was on a new course. It is a question whether at this distance from the Oregon shore he could see the same but he knew its general direction and was heading now not toward the shore but down the river. He could now see that the Boston was closer to the Oregon shore than he had assumed. He says speaking of the point at which he turned from the St. Helens Bar Range (A 108):

> Q. When you arrived at the turning point, Captain, the place you marked as turning point, state what was your then opinion as to passing the Boston Maru to the Oregon side, as you had intended?
>
> A. As I made my turn down the Oregon shore, I expected to pass the Boston Maru on the Oregon side, but in maybe getting a little further down I could see that she was perhaps pretty close to the Oregon shore.
>
> Q. Was that at the time of making your turn by the St. Helens range, or afterwards?
>
> A. After. I had made my turn expecting everything was all right.

But he did not realize how close the Boston was. Having left the range and proceeded down river for a distance he realized that he would have to go closer to the shore to pass the Boston and gave the order starboard a bit. The order was obeyed (A 108-109).

Now the steering gear of the Keats had been tested and found in order that same afternoon by the chief engineer, the first assistant and the chief officer (A 358, 364-365). Berry, Gillette and the quartermaster all testified that the vessel had answered her various helms properly coming down the river. *But it is the undisputed testimony of Berry and Gillette that she did not answer this last helm* (A 109, 421). The reason was apparent at once to Berry. She was so close to the bank that the suction prevented her answering (A 109). The Court will be advised by the undisputed testimony of several experts that a vessel traveling along a bank with shallow water on one side tends to "smell the bank," that is, her bow tends to turn away from the bank or her stern toward it. Under this starboard a bit helm the rudder tended to turn the vessel toward the Oregon bank but the suction tended to turn her head away from it and she kept going straight. Berry then ordered hard a-starboard, which order was obeyed (A 109). *The vessel did not answer. The helm remained hard over to starboard until after the collision.*

In reading Gillette's deposition parallel with Berry's testimony the court will find these orders and the bells to follow fully corroborated. Gillette took the times of the bells. The times were all short and are to be gauged by minutes and half minutes. For the convenience of the Court

we insert here a schedule of times and distances at the average speed:

8.84 nautical miles per hour
2.21 nautical miles 15 minutes
.736 nautical miles 5 minutes
.147 nautical miles 1 minute
3000 feet 3 minutes 42 seconds
2000 feet 2 minutes 14 seconds
1000 feet 1 minute 7 seconds
14.9 feet 1 second
8.84 nautical miles equals 10.17 land miles.

In the above data a nautical mile is figured at 6080 feet.

Very shortly after the hard a-starboard order Berry ordered the engines stopped and the order was obeyed. Gillette took the time which was 1:43 A. M. October 26th. The collision occurred at 1:44 A. M. At 1:45 A. M. after moving far enough along to be clear of the Boston, Berry ordered full astern. He made an unusually short stop and turn in the wide river at that point, having signalled Dalby on the Siersted to pass to port, proceeded up and stood by as required by law.

These are the facts about the conduct of the Keats. They are undisputed in the record. The rest of that part of the record touching the Keats relates to speculations and arguments as to what Berry should or should not have done. We con-

tend that there is no direct evidence in the record tending to show that any specific thing Berry did was negligent, and that the preponderance of testimony was that there is nothing he could reasonably have been expected to do that he did not do to avoid the collision.

Berry brought the West Keats down the usual navigating channel. He made the lights of the Boston when a little more than a mile distant. There was no evidence that he should have made them earlier. At the time he assumed that she was in the customary anchorage. There was no evidence tending to cast doubt on the reasonableness of this assumption.

The court will note the narrow angle subtended by a line from the amidships of the Boston to the regular anchorage and will also remember that the Boston was not straight ahead of Berry but partly around the bend.

There was no evidence tending to show that slowing, stopping or backing the engines of the West Keats would at any time have been practical, helpful or even safe.

The only question is whether Captain Berry should have turned out and passed on the Washington side of the Boston at the time he learned, or at the time he should have learned, that the Boston was too close to the Oregon shore for

safe passage. We invite particular attention to the cross examination by the trial court of Captain Sandstrom on this question. (A 163-167). The captain took a point on the chart 2150 feet from the place of collision. At that point he said Berry could tell something about the location of the Boston but would probably conclude that there was room enough for safe passage. He added, however, that a turn at that point to pass on the Washington side would be maneuvering sharply and dangerously.

We think that in this questioning of Sandstrom the trial court reached the heart of the case as far as the conduct of Berry was concerned. There was some little difference of opinion among the pilots but in the main they were substantially of the same view as Sandstrom. Grunstad spoke of the "shadow" cast by the Oregon shore (evidently meaning an area of deeper blackness and other pilots used the same word in the same connection) and the deceptive location of the anchored vessel. He thought that Berry might be able to tell at 2000 feet or closer if the night was darker (A 180-181) but that a turn at that distance would be abrupt and rather dangerous for a heavily loaded vessel. (A 181-182). Captain Sullivan refused to estimate the distance at which Berry might have known the location of the Boston (A 206-207). He said the only way of judging would be to estimate the space between the stern light of the Boston

and the front light of the Columbia City Range (A 208). He admitted (A 209) that a pilot might possibly come down within 1000 feet of the Boston and still reasonably think she was far enough out to be in a safe position. Sullivan was extremely indefinite on the matter of the turn. He first said this could be made at a 1000 feet but had in mind a situation in which the Keats was running directly at the amidships of the Boston (A 235-236). There being no evidence tending to show that this was the case he was asked to assume a situation in which the Keats was headed for the stern of the Boston. He said this turn could be made at a 1000 feet but that a pilot would not attempt it except under very extreme circumstances (A 242). Asked what order he would give to effect a turn of this kind he substantially refused to testify (A 243-244). McNelly was asked whether a turn of this kind could be made at 1500 feet but failed to answer yes or no. He said, however, that he thought the turn could be made at 2150 feet (A 293). Gildez said that in his opinion the turn could be made at 1200 feet, but admitted that it might result in a head on collision (A 315).

We think it a fair conclusion that the turn would have been impossible at a 1000 feet, substantially impossible or extremely dangerous at 1500 feet and sharp, unusual and dangerous at 2000 feet, or 2150 feet.

There is substantially no testimony in the record tending to show that Berry should have reasonably known at a distance of 2000 feet from the Boston that the passage between the stern of that vessel and the Oregon shore was dangerous. It is the substance of the testimony of the pilots that a turn at that distance to the Washington side would have been dangerous. Under these circumstances we think that Berry's conduct under a preponderance of the testimony is not shown to have been negligent. Indeed we believe that the preponderance is clearly the other way. As Berry approached nearer and nearer to the Boston the proximity of that vessel to the bank must have been more reasonably apparent to him but at the same time the difficulty of turning became greater. We think the record shows that a turn at any point after leaving the St. Helens Bar Range would have been fully as dangerous if not more so than the reasonable appearance of the passage between the Oregon shore and the Boston Maru.

For these reasons we believe that a preponderance of testimony upholds Berry's conduct and feel very sure that a preponderance does not condemn it. But it was contended before the trial court that Berry should have been on the other side of the river. This calls into question the

Narrow Channel Rule

It will be charged that the West Keats was proceeding in violation of Article 25 of the Inland Rules of Navigation as follows:

> Art. 25. In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

It will be said that the entire navigable portion of the river at this point was a narrow channel and it was the duty of the Keats to proceed on the right hand side.

The court will note the course the Keats would have taken if Berry had so navigated. On arriving about one mile from the point of collision Berry would have turned off the range to the right with the Washington shore about two-thirds of a mile away. He would have been without guiding lights except in so far as he might have sensed the appearance of the Columbia City group. At the point of crossing the Red Range he might have known his approximate position by looking back, but this would be only for an instant. Continuing down he would have cut through the usual anchorage ground and headed off into a black river below without guiding lights except possibly a couple of jetty lights a long distance away which he might or might not have been able to see. Arriving perhaps a

mile below the Columbia City range lights he would cross that range or perhaps be on it for a short distance to its end. There is not a scratch of evidence that any pilot ever navigated thus since establishment of the ranges. Such navigation would employ the St. Helens Bar Range only partly and the Columbia City Range little or none.

Respondent is contending for a construction of Article 25 which would make unlawful the use of the ranges established by governmental authority as aids to navigation. Surely it cannot be the intention of Congress that pilots should be prohibited, under pain of liability of their ships for damage from making use of aids established under congressional authority. It is clear that Article 25 must be construed to make lawful the use of range lights.

Article 25, because of the words "when safe and practicable" is always construed as flexible and is to be followed only "when safe and practicable."

The Klatawaw, (D. C. Wn.) 266 F 120.
The G. S. Tice, (2nd C. C. A.) 287 F 127.
The Three Brothers, (2nd C. C. A.) 170 F 48.

In fact, a local custom to pass to the left at a certain point due to peculiar conditions, has been upheld as lawful.

Transfer No. 21, (C. C. A. 2nd) 248 F 459.

But we contend that the Columbia River at this point is divided by governmental regulation (establishment of ranges) and custom into a ship channel on the Oregon side and an anchorage on the Washington side.

The Bee, 138 Fed. 303, 305.

The Circuit Court of Appeals of the second circuit affirmed the decision of the lower court reported at 127 Fed. 453, but corrected certain language of the lower court tending to hold that the entire upper New York Bay is a narrow channel within the meaning of Article 25. We are not familiar with upper New York Bay, but understand it consists of at least two channels, namely, the Main Ship Channel, and the Bay Ridge Channel. We understand further that between these channels are anchorage grounds and that the entire harbor is lined with docks, wharves and the like.

The court said (306):

> Inextricable confusion would result if, under rule 25, an incoming vessel in the main ship channel were to be justified in keeping close to its red buoys, and at the same time were to be held in fault because she did not keep hundreds of feet further east on the starboard side of the middle line of the entire body of water. It is sufficient on this appeal to hold that in the case of a bay,

> which is also a port or harbor, the entire body of navigable water is not to be considered a single narrow channel within rule 25, where through such bay there have been officially designated a plurality of channels (i. e., more than one channel) running substantially parallel with each other and in the same general direction as the main flow of the tide or current.
>
> *The La Bretagne*, 179 Fed. 286.

The La Bretagne amplifies the decision in the Bee case. These two cases mean that in upper New York harbor where there are two channels more or less parallel and the whole harbor is as narrow as some waters which are construed to be narrow channels, each channel by itself is a narrow channel within the meaning of Article 25, and the whole harbor together is not such a narrow channel. In our case we have off Columbia City an expanse of deep water, wide for the Columbia River but as narrow as some waters which are construed to be narrow channels. This expanse of deep river has two distinct parts. The westward side marks the waters between the two ranges and has been designated by the establishment of these ranges as the ship channel for use especially at night. The eastward side of the river has been designated by usage and custom of the pilots as an anchorage ground. It stands to reason that a vessel going down the river, in order to comply with the narrow channel rule at this point, is not required by

Article 25 to leave the designated ship channel and invade the customary anchorage ground.

George F. Randolph, 200 Fed. 96.

The narrow channel rule undoubtedly applies to the main ship channel between Governor's Island on the east and Bedloe's and Ellis Islands, on the west. The La Bretagne, 179 Fed. 286, 102. C. C. A. 651. The Randolph claims, however, that the channel is the entire navigable channel, and not the space between the anchorage grounds, and upon that theory that the Randolph was about the middle of the channel, and, therefore, was not violating the narrow channel rule.

I cannot concur with this claim, especially as applicable to navigation in a fog. Rules and regulations have been officially promulgated for New York Harbor, and certain anchorage grounds and channels have been laid out and charted. It is a contradiction in terms to hold that vessels may rely upon those rules, and anchor in a place of presumed safety, and yet, because the anchorage grounds is a part of the channel, be subject, in a fog, to collision and damage. While this precise question seems not to have been decided in any reported case, this view is impliedly sustained in The Mahonoy, (D. C.) 126 Fed. 587, and I find nothing in the C. W. Morse, 171 Fed. 847, 88 C. C. A. 665, to the contrary.

It seems clear under these decisions that the narrow channel opposite Columbia City within the meaning of Article 25, includes only that part of the river designated by the range lights as the ship channel and does not include the entire river or the anchorage grounds.

We take it that this court will not condemn the West Keats in damages for using the range lights at night.

But there is another reason why, as we contend, Article 25 has nothing to do with this case. There was nothing coming up the river in sight and a wide and deep river below. Berry had only the Boston to look out for. He could lawfully pass by on either side consistent with regular usage and the circumstances. *Article 25 is a passing rule and does not relate directly to anchored vessels.* A moving vessel must keep out of the way of a vessel properly anchored, but has superior rights in any part of the channel to a vessel anchored so as to prevent or obstruct the passage of other vessels.

The John H. Starin, 122 Fed. 236, 239.

We have already cited this case. The Starin was in collision with the Gurney which was improperly anchored. One of the faults attributed to the Starin was failure to keep on the right hand side of the channel. The court said:

> There being no pretense that this is a case of meeting vessels, we do not think negligence can be predicated of the fact that the Starin was navigating in the center of the channel.
>
> *The Belfast,* 226 Fed. 362, 366.

We have also cited *The Belfast.* The Wayne was improperly anchored and the Belfast was on the left hand side of the channel. The court said (366):

> Article 25 of the Inland Navigation Rules is a rule of the road and *defines the respective rights of moving vessels in narrow channels.* As against a vessel entering through this channel, the Belfast was bound to keep her starboard side of it. Her rights on the other side of the channel were inferior to those of the entering vessel. But as against a vessel not proceeding, but wrongfully lying at anchor there, the Belfast's right as a traveling vessel was superior in any part of the channel. The John H. Starin, 122 Fed. 236, 239, 58 C. C. A. 600.

Proximate Cause and Last Clear Chance

Assuming that the position of the Boston at the time of the collision is to be condemned, was it a proximate cause of the collision? It must be shown that the fault of the Boston proximaely caused or contributed to the accident and that the effect of her fault was not broken by some intervening cause in which she was not con-

cerned; that the collision would not have occurred but for (at least in part) her fault.

Under the facts it is perfectly plain that if she had been almost any place else in the river the collision would not have occurred.

We have cited many cases in which vessels at anchor were run into by moving vessels. In nearly all of these cases the anchored vessel was held at fault for improper anchorage. In some of them the moving vessel was also held at fault and the damages were divided. In none of them, however, is it suggested that the fault of improper anchorage is not proximate. All of these cases are authorities for the proposition that faults of the Boston both in anchoring badly and in failing to take proper precaution thereafter were proximate.

Furthermore the Boston had swung around about 180 degrees between the time of the anchorage and the time of the collision. The evidence indicates almost to a certainty that she was actually swinging at the instant of collision. From a time 34 minutes before the collision she started to become more and more a menace to navigation but did nothing to correct the situation, and even failed to warn the approaching West Keats of her dangerous position. Her fault continued and became more aggravated to the instant of the collision.

So far as we know the last clear chance doctrine of the common law is not a part of the admiralty jurisprudence. Perhaps one reason is the early adoption of the rule dividing damages in case of fault. The only rule of liability we have seen in the authorities is that where the fault of a vessel proximately causes or contributes to the damage, she is condemned in full or half damages as the case may be.

> *The Yucatan,* 236 Fed. 436.
> *American-Hawaiian Steamship Co. vs. King Coal Co.,* 11 Fed. 41.

We do not feel that we understand thoroughly the meaning of these decisions. Based upon them respondent argued in the District Court that even if it were conceded that the Boston was improperly anchored it does not follow that she should pay *any part* of the damage. Are the ancient admiralty rules being set aside in this circuit in favor of new doctrine? Where a vessel anchors or moors in violation of local custom or regulation or of the Act of Congress forbidding improper anchorage, does she escape liability to a negligent colliding vessel? Can she recover all of her damages from such vessel? If the moving vessel also is not at fault is she held anyway, or is there no recovery by either? Does it matter what the degree of negligence or improper conduct of the anchored vessel may be? Would it be the same if the anchored vessel deliberately

violated the statute? Or if her pilot carelessly violated it in order to be able to go to sleep earlier, as we believe was the situation in the present case? Would the rule be thus in the case of a vessel not anchored but drifting? We do not find the words "last clear chance" in either of these opinions but we confess doubt as to whether the court has not applied that common law doctrine in fact although not in name.

The Yucatan.

The court does not say that the state of Oregon was guilty of negligence in anchoring the cruiser Boston in the fairway. It appears to hold that such negligence, if any, would not be proximate. Yet we take it the collision would not have occurred but for such negligence, if any. True, there was another proximate cause in the negligence of the Yucatan. Frankly, we fail to see why both negligences, if the cruiser Boston was improperly anchored, did not contribute.

A similar situation was before the 6th Circuit in

The Miner, 260 Fed. 901.

The Halcyon had been improperly moored at the place of the collision for more than a year. The captain of the moving vessel had had abundant opportunity to observe her position and this fact bore heavily against him on the issue of his own conduct. But the Halcyon was not allowed to escape.

We confess we are disturbed by some of the language of *The Yucatan,* but not by the decision itself. The facts are distinguished from those of our case on the ground that the negligence of the cruiser Boston had spent itself. We understand the last clear chance doctrine does not apply in cases where the negligence of one party has spent itself. If I carelessly catch my foot in the rails so that I cannot move, my negligence is thereupon spent. If I sit or lie on the track at least partly awake and able to move my negligence remains active and proximate.

The Boston Maru went to anchor only the night before. From the time her anchor was cast until the collision she drifted around substantially 180 degrees. She was probably drifting at the time of the collision. Her anchor watch knew or should have known or should have been advised by the pilot that she was drifting across the channel at the intersection of the ranges. The pilot of the Keats had had no previous opportunity to observe her wrongful position. The negligence of the Boston Maru was in no sense spent but was active at the instant of the collision.

King Coal Case.

This case is also distinguishable on its facts and in the same manner. But we are at a loss to explain in the light of generally accepted doctrines of admiralty the language of the opinion

written by our distinguished and learned opponent in the case at bar.

We remind the court that we have cited in this brief only a few of hundreds of admiralty cases where vessels improperly anchored or moored were condemned for part or full damages. We do not find in them any suggestion that wrongful anchorage or moorage is not proximate.

The Waterford, 6 Fed. 2nd 980.

This case was cited to the trial court by respondent on the proposition that even though the Boston were conceded to be at fault the entire damage must be paid by the Keats. But here the moored vessel was found not at fault. The court said (981):

> The Merchant was not at fault. There is no finding of active fault as to her. It is predicated solely upon her mere presence at the point of collision, based upon an alleged controlling regulation which the District Judge referred to.

This is clearly a denial of the existence or controlling character of the regulation referred to.

The Kathleen Tracy, 296 Fed. 711.

This opinion of the Southern District of New York was also cited. Here it appeared that the vessel dragged out of the regular anchorage

through stress of weather. No negligence was shown on her part.

The Daniel McAllister, 258 Fed. 549, 2nd C. C. A.

This is one of the cases cited in the *King Coal* case and properly since it involves a similar harbor regulation. The New York municipal law forbids boats lying across pier ends "except at their own risk of injury from vessels entering or leaving any adjacent dock or pier." The 2nd Circuit had already held this statute invalid in so far as it attempted to impose a rule of liability on the Courts of Admiralty. However, they recognized departure from the regulation as evidence of negligence sufficient to throw the burden of proof on the violator. Here the tug was clearly at fault. Its negligence broke up various barges from their moorings and set them in collision with one another. We cannot see a suggestion of the last clear chance doctrine in this case.

In the present case the Boston Maru's anchorage was in violation of a statute of the United States. Congress has a clear right to impose a rule of maritime liability on the Federal Courts. *To hold the Boston at fault in her anchorage at the time of the collision, or to say that her anchorage, if wrongful, is immaterial or not proximate, and relieve her from damages on any theory whatever, is to allow her to violate the statute with impunity.*

Conclusion

The principal issues in the case resolve themselves in our minds as follows:

The Boston Maru at the time of the collision was anchored improperly and in violation of the statute. Her negligence was a proximate cause of the collision. It sufficiently explains the collision without more. The burden of proof is upon her to show that there was fault in the navigation of the West Keats. This she has not done by a preponderance of the evidence. Indeed, the preponderance is the other way. Captain Berry's belief that the Boston was in the usual anchorage ground is shown to have been reasonable. He was navigating the channel authorized by the ranges. There was no evidence tending to show that he should have known or suspected that the Boston was out of place before he did. Therefore the cases should be reversed with mandate for the entry of judgment in favor of the West Keats for the stipulated amount with costs.

Respectfully submitted,

George Neuner,
United States Attorney,

MacCormac Snow,
Proctors for the United States as owner of the West Keats.